NIRA SDN. BHD.

v.

MALAYAN BANKING BHD.

SUPREME COURT, KUALA LUMPUR
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 538 OF 1988]
21 SEPTEMBER 1989

LAND LAW: *Order for sale of land by public auction - Appeal against order - Alleged error in the sum claimed - Whether requirements under ss. 256, 257(1)(c) National Land Code fulfilled.*

This is an appeal by Nira Sdn. Bhd. against an order of the High Court made under s. 256 of the National Land Code that certain lands charged to Malayan Banking Bhd. be sold by public auction to satisfy the whole sum secured by the said charges which was due to the respondent as at 31 October 1988.

The main grounds of appeal were the fact that the learned Judge had erred in law and fact in holding that there was a sum of RM17,339,452.43 due on the Term Loan as at 31 October 1988 and a sum of RM2,571,605.96 due on the overdraft and that the learned Judge ought to have held that there was an error by the respondent in the calculation of the interest of the term loan.

Held:

[1] It was pointed out that the manager of the respondent's Kuala Lumpur main office had affirmed an affidavit stating the total balance of sums due to Malayan Banking. There was no reply by the appellant to that affidavit and in the circumstances the learned Judge could not come to any finding except to hold that a sum of RM17,339,452.43 was due on the term loan account as at 31 October 1988 and a sum of RM2,571,605.96 was also due on the appellant's overdraft account on that date. The calculation of the interest on the term loan was calculated by the respondent and has been produced as exhibits with the various notice of variations of interest given by the respondent to the appellant. There was no reply by the appellant to the affidavit of the respondent's manager. There are therefore no merits in the grounds of appeal raised by the appellant.

[2] Although s. 257(1)(c) of the National Land Code 1965 provides that every order for sale made by the Court under s. 256 shall "specify the total amount due to the chargee at the date on which the order is made", the essential requirements of the law are that there must be compliance with ss. 254 or 255 of the National Land Code 1965. On the evidence adduced the respondent had satisfied the Court that the prior requirements of the law for an order for sale by the Court have been complied with, and that default has been made by the appellant.

[Appeal dismissed with costs.]

Case referred to:
Chettiappah Chetty v. Raja Abdul Rashid [1931-1932] FMSLR 345

Legislation referred to:
National Land Code 1965, ss. 149, 254, 255, 256, 257(1)(c)

For the appellant - K. Chandra; M/s. K. Chandra & Co.
For the respondent - S.M. Yoong; M/s. Shook Lin & Bok

JUDGMENT

Gunn Chit Tuan SCJ:

Nira Sdn. Bhd. (the appellant) had appealed against an order of the High Court at Kuala Lumpur made under s. 256 of the National Land Code 1965, that the lands held under Geran No. 4365 and CT No. 22086 for Lot Nos. 35327 and 4554 respectively, Mukim of Kuala Lumpur and charged to Malayan Banking Bhd. (the respondent) under the Wilayah Persekutuan Registrar of Charges Presentation No. 12,810/82, Jilid 264, Folio 62 and Presentation No. 18,715/82 Jilid 275, Folio 166, be sold by public auction on 10 March 1989, to satisfy the whole sum secured by the said charges which was due to the respondent as at 31 October 1988.

According to Mr. K. Chandra, Counsel for the appellant, the main grounds of appeal were the following grounds no. 2 and 3 in the memorandum of appeal:

2. The learned Judge erred in law and in fact in holding that there was a sum of RM17,339,452.43 due on the term loan as at 31 October 1988 and sum of RM2,571,605.96 due on the overdraft.

3. The learned Judge ought to have held that there was an error by the respondent in the calculation of the interest on the term loan.

Section 2.07 (b) of the Exhibit MBB1 states:

> The interest chargeable between the date on which the full amount of the term loan shall have been disbursed, advanced or paid as aforesaid and the anniversary date of which shall be calculated on the full amount loan and all other sums then payable by the chargor shall be deemed to be due forthwith upon such date.

Section 2.07 (c) states:

> In and for each succeeding year thereafter interest shall be calculated on the total amount of the monies due to the bank hereunder (whether for principal or interest) as at the last day of the preceding year and shall be deemed to be due on the 1st day of the year in respect of the year then commencing.

Respondent/plaintiff has calculated the interest on the balance outstanding at the end of each month.

With respect to the contention of Counsel on ground 2 above, it must be pointed out that the manager of the respondent's Kuala Lumpur main office had affirmed an affidavit on 27 October 1988, stating that the total balance sums due to Malayan Banking Bhd. as at 31 October 1988 were as follows:

(i) **Term Loan Account**

RM17,339,452.43 particulars of which are as follows:

Outstanding principal as at 30 June 1984	RM 7,929,779.23
Total overdue interest (26 June 1982 to 30 June 1984)	RM 2,515,462.19
Outstanding sum due as at 30 June 1984	RM10,445,241.42
Add Total overdue interest from 1 July 1984 to 31 October 1988	RM 5,197,551.56
Sub - Total	RM15,642,792.98
Add Total penalty interest from 1 July 1984 to 31 October 1988	RM 1,696,659.45
Amount due as at 31 October 1988:	RM17,339,452.43

From 1 November 1988 interest at the default rate per annum of 1% plus prescribed rate (4% p.a. + BLR) on RM15,642,792.98 shall be added to the outstanding sum of RM17,339,452.4 to the date of full payment; and

(ii) **Overdraft Account**

RM2,571,605.96 with interest thereon at the rate per annum of 4% + BLR and at as additional 1% per annum on the overdraft in excess of the approved limited of RM2 million, both with monthly rests from 1 November 1988 to be date of full payment.

There was, however, no reply by the appellant to that affidavit and in the circumstance we could not see how the learned Judge could have come to any other finding except to hold that a sum of RM17,339,452.43 was on the term loan account as at 31 October 1988 and a sum of RM2,571,605.96 was also due the appellant's overdraft account on that date.

As regards ground 3 above, we again noted that the manager of the respondent's Kuala Lumpur main office had in another affidavit dated 23 August 1988, denied that there was any error in the computation of interest for the term loan as alleged by one Tan Kim Seng, the finance manager of the appellant, in his affidavit affirmed on 21 April 1988. The said manager pointed out that the appellant had written to the respondent and asked the respondent to workout the amount of monthly interest for it (i.e. the appellant). The respondent in response to the term loan was calculated in accordance with ss. 2.05 and 2.07 of the charge instrument, and has produced as exhibits the various notice of variations of interest given by the appellant to that affidavit of the respondent's manager. There were therefore no merits in the above ground of appeal raised by the appellant.

In conclusion we were of the view that although s. 257(1)(c) of the National Land Code 1985, provides that every order for sale made by the Court under s. 256 shall "specify the total amount due to the chargee at the date on which the order is made;" and therefore requires a chargee to show the Court the total amount due to it at the date on which the Court makes the order, yet we considered that for the purpose of enabling any chargee to obtain the sale of a land or lease to which his charge relates in the event of a breach by the chargor of any the agreements on his part expressed or implied therein, the essential requirement of the law are that there be compliance with the provisions of ss. 254 or 255 of the National Land Code 1965. In this case we observed that the respondent had by a letter dated 3 March 1987, through its solicitors M/s. Shook Lin & Bok demanded of the appellant within 7 days from the date thereof payments of the whole outstanding balances on the appellant's first and second charges. The appellant received the said letter but failed and or neglected to pay the sum due, and accruing interest thereon or in part thereof within the periods specified and had thereby committed a breach of one of the terms of the said charges. The said breach committed by the appellant of the term of the said charges having continued or a period of more than 7 days, the respondent through its solicitors then caused a statutory notice of default in Form 16D of the National Land Code 1965, dated 21 March 1987, to be issued requiring the appellant to remedy the said breach within a further period of 7 days the date of receipt of service thereof failing which an order for sale would be applied for. The said notice was received by the appellant on or about 21 March 1987, but it failed and or neglected to remedy the said breach. It should be mentioned here that by s. 8.01 of the Annexure to the said charges it has been provided that:

A demand for repayment of the moneys hereby secured or the balance thereof together with interest thereon and any other money due as aforesaid under any of the provisions of s. 8.01 hereof may be made by a notice demanding payment within seven (7) days from the date of notice. Service of such notice shall be effected in the same manner as provided in s. 12.0 hereof.

On the evidence adduced the respondent had on its applications satisfied the Court that the prior requirements of the law for an order for sale by the Court have been complied with, and that default has been made by the appellant. The learned Judge was therefore correct in making the said order that the lands in question be sold by public auction under s. 256 of the National Land Code to satisfy the sums due to the respondent.

In this context we would consider it relevant to refer to the following passages in the judgment of the former FMS Court of Appeal concerning the exercise by a chargee of his remedy under the provisions of the former Land Code 1926, where default in payment has been made by a chargor, delivered by Thorne Ag. CJ (as he then was) in *Chettiappah Chetty v. Raja Abdul Rashid* [1931-1932] FMSLR 345 in which his Lordship said as follows:

> By s. 149 of the Land Code, it is provided that, after establishing the default on the part of the chargor in accordance with the provisions of the earlier sections of the Code, it shall be lawful for the chargee by summons to call the proprietor of the charged land to show cause why the land should not be sold by public auction under the direction of the Court.
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> It is to be noted the legislature in its wisdom has provided that the chargee may not exercise his right against the charged lands without first establishing that a default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the Court has to do on such an application is to satisfy itself that complied with, and that default has been made by chargor.

In this case, having satisfied ourselves that the requirement of the law under the provisions of the National Land Code 1965, have been complied with and that default has been made by the chargor, we therefore did not consider it necessary to call upon Miss Yoong, Counsel for the respondent, to reply and dismissed the appeal with costs and ordered that the deposits be paid to the respondent on account of taxed costs.

Also found at [1990] 1 CLJ 36